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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 1374 90

PEOPLE OF THE STATE OF ILLINOIS EX REL VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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MAY IT PLEASE THE COURT:

The Motion to Dismiss Appeal.

Appellant's Jurisdictional Statement presents in detail her position that the present case involves a state statutory provision within the terms established by this Court in *Hamilton* v. *University of California,* 293 U. S. 245 (1934). The record in this case also shows that Appellant presented

federal constitutional issues to the State Supreme Court and that the State Supreme Court ruled on their validity under the Constitution of the United States. In *Wilson* v. *Cook*, 327 U. S. 474 (1946), this Court says that one of these showings is necessary.

Appellees claim that no issue was properly raised because appellant's complaint asked for affirmative action prohibiting religious teaching by sectarian groups in the public schools during school hours and in the regular school class rooms made available by temporary abandonment of public school work. Appellees claim that this is an attack on inaction, involving not legislation but a failure to legislate. This statement is difficult to understand. The conduct complained of in this case is not one of inaction, but one of affirmative action in authorizing sectarian groups to appear and teach as a part of the public school system. The purpose of this suit is to defeat such action. Had there been no affirmative action permitting sectarian teaching as a part of the public school curriculum, there would have been no case in the State courts and no appeal to this Court.

This case involves affirmative action, legislative in character, and presents a problem with respect to all public schools in Illinois. In this respect it is much more important than *Hamilton* v. *University of California*, 293 U. S. 245, which involved but one state institution.

The fact that the action is one of a local governmental body does not defeat jurisdiction. *King Manufacturing Company* v. *Augusta*, 277 U. S. 100 (1928). In the present case jurisdiction is stronger than in the *Augusta* case, for the action supported by the Supreme Court of Illinois establishes a policy applicable to all school bodies within the state.

Federal Constitutional Issues Are Involved.

Appellees contend that both appeal and petition for certiorari should be denied on the ground that federal constitutional issues were not substantially presented, and that such issues were properly decided by the Supreme Court of Illinois. Appellees further allege that Appellant did not rely on the First Amendment in presenting the case to the Supreme Court of Illinois, which obviously she did not.

As indicated in Appellant's Jurisdictional Statement, her complaint was a tax-payer's action, and alleged violation of the Fourteenth Amendment both in expenditures for religious purposes and in other respects (R. 5, 10, 12, 17, 18). That the present action is a taxpayer's action is expressly recognized by the Supreme Court of Illinois. The briefs before the Supreme Court of Illinois are not before this Court, but Appellees are correct in their intimation that Appellant's brief separately discussed the provisions of the Illinois constitution which forbid preference to any religious denomination or mode of worship, and also forbid any contribution or pay from any public fund in aid of any church or sectarian purpose (Illinois Constitution, Article II, Section 3; Article VIII, Section 3). Appellant's brief also separately argued the application of an Illinois statutory provision as to other uses of public school buildings "when not occupied by schools" (Illinois Revised Statutes, 1945, Chapter 122, Section 6-43). The final construction of these state constitutional provisions and of this state statute rested with the Supreme Court of Illinois and is not presented to this Court.

Appellant, however, is in error in saying that "the attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution." Weight was largely placed upon the State statute.

Other issues discussed by Appellant's brief in the Supreme Court of Illinois related to freedom of religion;

segregation of religious groups in public schools; and religious censorship of groups permitted or refused permission to participate in sectarian instruction in the public schools. Each of these issues was argued on the basis of the 14th Amendment and of similar provisions of the State Constitution. Appellees now assert that Appellant cannot claim that there was improper use of public property and public funds in the application of such a policy. In broadly charging interference with freedom of religion through sectarian use of public schools, Appellant's brief in the Supreme Court of Illinois made no specific statement that public schools are financed by taxation, but left to judicial notice the fact that the activities alleged to violate the Fourteenth Amendment necessarily involve the expenditure of public funds. The contention of Appellant is that sectarian education is made a part of the public school system. The charging of one individual or one religious group with the religious expenses of another is no more a denial of freedom of religion than is the discrimination between sectarian groups in public schools, and each will involve public funds. Public expenditure as a part of the plan here at issue is fully covered by Appellant's complaint, and is an essential element in the plan of making sectarian education a part of the public school system through the use of public schools during regular school hours. And from the standpoint of freedom of religion there is certainly a difference of financial interest between those permitted and those not permitted to give religious instruction in the schools.

Appellees claim that the religious instruction here at issue is voluntary, upon request of the parents, and equally open to all religions and to all religious teachings. Such instruction primarily relates to the 4th, 5th and 6th grades (R. 117, 287, 330-331). The attendance of public schools by children is not voluntary upon their part or that of their parents, and the intended purpose of the plan here at issue

is for religious groups to reach children who are assembled by the public schools.

In this case the school authorities distributed and then collected a "Parent's Request Card" which requested that the parents "please permit" the pupil "to attend a class in Religious Education," with an opportunity to choose "Interdenominational, Protestant, Roman Catholic, Jewish" (R. 227). At no time was there interdenominational instruction except the Protestant; and for two years before this litigation no Jewish instruction had taken place (R. 287, 294).

All students in a grade class were classified by the school authorities. Protestant and Catholic were assigned class rooms for use during what were otherwise public school class hours. The Protestant group being dominant in number, the regular class room was usually employed for religious teaching, with the public school teacher remaining in the room during the religious instruction (R. 119, 172, 177). In such a case the Catholics were assigned another room (R. 194). Those who did not take religious education remained in their room if those taking religious education went elsewhere (R. 190, 319); otherwise, they went elsewhere (R. 318). The boy here most directly involved was once sent to sit alone in the corridor (R. 171-173).

Those who belonged to the religious groups, together with those who did not, were definitely segregated in their public school building and during their public school hours. Whether there is a program of religious education voluntary to all parties and in accord with religious freedom is for this Court to determine. The segregation of students of necessity emphasizes religious differences, beginning with the 4th grade of the public schools. Appellant quotes here her statement to the Supreme Court of Illinois:

> "Friction in religion has been a characteristic of children which is not uncommon among adults—a char-

> acteristic which has in the past brought some conflict among children of different religious groups, even in the absence of separate public school classifications which would obviously differentiate religious groups, and lay the basis for religious controversy."

Appellees' statement opposing jurisdiction makes an interesting contrast between a public school cafeteria and the issue here involved. If a public school cafeteria were so operated as to completely segregate into separate rooms and to prejudice those of different religious groups, something of contrast might be sustained.

The alleged freedom to teach all religions does not exist in this case. As indicated in Appellant's Jurisdictional Statement, the Supreme Court of Illinois stated that "the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." The discretion to permit or forbid teaching by a particular religious group was presented to the trial court, which, in its opinion, said:

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." (R. 83.)

Not only this, but the Supreme Court of Illinois said in its opinion that: "Questions of policy are solely for the determination of the board * * *." And in their Statement opposing Jurisdiction, Appellees, while stating that additional groups, even atheists, are permitted to participate in religious instruction, state that:

> "Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

The record in this case clearly presents the issue of *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), in which this Court held that censorship of religion is violative of the Fourteenth Amendment.

This Case Involves an Important Federal Question Not Heretofore Determined by This Court.

This case involves the bringing of religious teaching into public schools by sectarian groups, through the use of public school buildings and hours, and through the use of public school teachers or officers for the gathering of the groups of pupils—a joinder of sectarian teaching with that of the public schools, subject to supervision and administration as a part of the public school system.

The Court of Appeals of New York and the Supreme Court of Illinois have sustained a plan under which public school students may be excused at the request of their parents for one hour each week before the end of the regular school period for the purpose of attending religious educational classes outside of the school activities or property. *People ex rel Lewis* v. *Graves*, 245 N. Y. 195 (1927); *People ex rel Latimer* v. *Board of Education of the City of Chicago*, 394 Ill. 228 (1946). Neither of these cases involved the bringing of sectarian instruction into public schools by sectarian instructors. Each gives the student an additional hour within which to join his sectarian instructors upon their own premises. The issue in these cases was essentially different from that here presented.

This Court has recently sustained a use of public funds to pay expenses of transportation not only to public schools but also to parochial schools to which students were permitted to go instead of attending public schools. *Everson* v. *Board of Education of Ewing Twp.*, ... U. S. .....; 67 S. Ct. 504 (February 10, 1947). The *Everson* case in no way

involves the issue of bringing sectarian instruction into the public schools.

The *Everson* case and that of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930) are based upon the fact that the use of parochial schools is permitted in substitution for compulsory public education. Under these circumstances, the public bore an incidental expense but avoided a much heavier one, without sponsoring sectarian teaching. The case now before the Court brings sectarian education into the public schools, as a part of their curricula.

The present case involves issues which must be settled if the freedom of religion is to be maintained.

Respectfully submitted,

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